NO. 22153
22153-A

United States Court of Appeals

NINTH CIRCUIT

GEORGE ULLMAN & JOE SIMON,
INTERESTED PARTIES,

Appellants,

vs.

KYLE Z. GRAINGER, JR., et al.,

Appellees.

Appeal from the United States District Court for the
Central District of California.

APPELLANTS' OPENING BRIEF

JOHN N. FROLICH, ESQ.
727 West Seventh Street
Los Angeles, California 90017
622-8104

Attorney for Appellants

DEAN-STANDEFER COMPANY
215 W. 5th, L.A. 90013

TOPICAL INDEX

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED

NO. 22153
22153-A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE ULLMAN & JOE SIMON,
INTERESTED PARTIES,

Appellants,

vs.

KYLE Z GRAINGER, JR., et al.,

Appellees

Appeal from the United States District Court for
the Central District of California

APPELLANTS' OPENING BRIEF

I
FACTUAL BACKGROUND OF CASE

The Debtor Corporation filed the instant proceedings for the Reorganization of a Corporation and its subsidiaries under Chapter X of the Bankruptcy Act on January 31, 1964. KYLE Z. GRAINGER, JR. is the duly appointed, qualified and acting Reorganization Trustee in the within proceedings, and the law firm of GENDEL, RASKOFF, SHAPIRO and QUITTNER is acting as his attorneys.

There are three consolidated appeals before this Honorable Court. They were consolidated by Stipulation and Court Order thereon (C.T. p. 199-201). All three appeals involve the same real property and the issues relating thereof by the Reorganization Trustee (C.T. p. 200, lines 16-18).

Reference shall be made to the Real Property in this Brief either as "PROPERTY" or by its street address of 929 South Hope Street, rather than by its legal description.

At all times herein mentioned and until April 7, 1967, the legal title to 929 South Hope Street was not and had never been rested in the Reorganization Estate or any of the Debtor Corporations, but was vested in the University of America Foundation, a corporation which is represented by attorney JOHN N. FROLICH (the same attorney who represents the appellants herein). An Order to Show Cause and Restraining Order had previously been filed by the Reorganization Trustee in an attempt to have the subject property declared the property of the Reorganization Estate. The University of America Foundation had been contesting the position of the Reorganization Trustee for a period of approximately two years prior to April 7, 1967. (C.T. p. 57,

line 29 to p 58, line 3) No court hearing was held on the Order to Show Cause However, the University of America Foundation stipulated to an injunction which restrained them from selling the property.

Said Real Property was encumbered by a purchase money First Trust Deed upon which a default was recorded sometime in 1966 A Trustee's (under the Trust Deed) Foreclosure Sale was advertised for January 19, 1967, at 11 a m by the said Trust Deed Trustee at the request of the beneficiary SCOTTISH RITE CATHEDRAL ASSOCIATION (C T p 53 line 25 to p. 55,line 21 [no p. 54]) The unpaid balance of the First Trust Deed was approximately $125,000 00 on January 19, 1967 (R.T p 13C, lines 18 to 23)

The University of America Foundation, through their attorney JOHN N FROLICH, agreed to permit the Reorganization Estate to hold a sale of 929 South Hope Street—the subject Real Property—in the Bankruptcy Court, and agreed, upon confirmation of a sale, to cooperate in delivering title to the Real Property at the time that escrow was to close, so that the Reorganization Estate could benefit by the equity in the property. At that time (after a sale) the University of America Foundation would release any claim on the funds paid to the Reorganization Estate.

The Reorganization Trustee, pursuant to Court Order, advertised a sale of 929 South Hope Street to be held in the courtroom on January 11, 1967. No acceptable offer having been made at that time, the matter of the sale of 929 South Hope Street was continued by the Court to January 19, 1967, at 9:30 a.m., one and one-half hours prior to the Foreclosure Sale on the subject property. It was agreed by all interested parties that the minimum bid which would be acceptable to

the Estate should be $275,000 for a free and clear title to the property. (C.T. p. 51, lines 10 through 26) (R.T. Jan. 19—67 p. 5, lines 24 to 26) Arrangements had been made between JOHN N. FROLICH, counsel for University of America Foundation and MONTA SHIRLEY, attorney for SCOTTISH RITE CATHEDRAL ASSOCIATION, that if the Bankruptcy Court confirmed a sale of the subject real estate before 11 a.m. on January 19, 1967, then the Foreclosure Sale would be continued by the SCOTTISH RITE in order to permit the sale to go through escrow.

At approximately 3:15 p.m. on January 18, 1967, JOHN N. FROLICH was contacted by SIMMONS, the President of University of America Foundation (the appellants herein) and advised that two men had inspected the Property and they were interested in purchasing 929 South Hope Street and desired an appointment. FROLICH contacted ARNOLD QUITTNER (who was out of town) and KYLE Z. GRAINGER, JR., the Reorganization Trustee, who was present during the negotiations which continued until approximately 7:00 p.m. on January 18, 1967, in the office of FROLICH. The appellants were not represented by legal counsel during the negotiations on January 18, 1967, and asked JOHN N. FROLICH to present their offer to the Court at the hearing the next morning. As a result of the discussion in FROLICH's office on January 18, 1967, an unconditional written offer to purchase was entered into between ULLMAN, SIMON AND GRAINGER, the Reorganization Trustee, which was accepted by GRAINGER subject to Court approval (C.T. pp. 66 and 67) and witnessed by JOHN N. FROLICH.

On January 19, 1967, the Court orally approved the offer of ULLMAN AND SIMON, and the Foreclosure Sale of the

Real Property was voluntarily continued by the beneficiary SCOTTISH RITE CATHEDRAL ASSOCIATION in order to permit the Reorganization Trustee to close escrow with the purchasers.

Differences of opinion occurred between the attorney for the Reorganization Trustee and the purchasers as to the meaning of the term "Appurtenances" in connection with the sale. This was resolved at a conference held in the courtroom of the Referee, to the satisfaction of all parties, and a COURT ORDER CONFIRMING AND APPROVING SALE OF REAL PROPERTY (929 South Hope Street) was filed on February 10, 1967, and entered on February 14, 1967. (C.T. p. 51, lines 26 to 32) A copy of said Order may be found in the Clerk's Transcript (C.T. pp. 18 through 22).

The Real Property involved consisted of a two-story building located at 929 South Hope Street and a parking lot area adjacent thereto on the north side of the lot. In all prior discussions among the Referee, the Reorganization Trustee, his attorney, University of America Foundation, and its attorney, all parties were of the opinion that the lease of the parking lot contained a 30-Day Cancellation Clause which could be invoked by a purchaser of the real property upon a valid sale. The lease was entered into by the University of America Foundation (without legal counsel) and at a time after the instant Chapter X proceeding had been filed. CHARLES SIMMONS, II, who executed said lease on behalf of University of America Foundation, notified the Reorganization Trustee and his attorney of the lease. Prior to the execution of this renewed lease, QUITTNER had notified the Lessee that the Reorganization Trustee did not recognize the title of the University of America Foundation and that all

rent payments to University of America Foundation, the alleged Lessor, were made at their peril by the Lessee.

The purchasers ULLMAN AND SIMON were advised of a 30-day cancellation clause in said lease by JOHN N. FROLICH and KYLE Z. GRAINGER, JR. on January 18, 1967. ULLMAN & SIMON are parking lot operators. Although not part of the discussions in open court at the time of oral confirmation of sale on January 19, 1967, nor part of the Court Order of February 10, 1967, confirming the sale, the 30-day cancellation clause was recited in the escrow instructions. (C.T. p. 22, para. 1)

An escrow was opened at the Hollywood National Bank on February 3, 1967, and the escrow instructions were made part of the Court Order of February 10, 1967 (C.T. pp. 21-22). The purhcasers, ULLMAN AND SIMON, were prepared to close escrow within the original 30-day period; however, the Reorganization Trustee, through his attorney, ARNOLD QUITTNER, requested additional time in order to bring on an ORDER TO SHOW CAUSE and APPLICATION FOR POSSESSION OF REAL PROPERTY (the Parking Lot), after he discovered that the Parking Lot Lease had no cancellation clause. The Lessee CHARTER AUTO PARKS answered and objected to the summary jurisdiction of the Bankruptcy Court (C.T. pp. 128-131).

Thereafter, on March 23, 1967, QUITTNER wrote JOHN N. FROLICH a letter advising in part that "under the existing circumstances and in view of the apparent intent of CHARTER AUTO PARKS to litigate the matter, the Trustee now advises you on behalf of the buyers (GEORGE ULLMAN and JOE SIMON) that it appears unlikely that possession of the Parking Lot can be delivered within a

reasonable period of time, and, accordingly, it now appears that the Trustee will be required to refund the deposit of $27,500.00. Please advise me on or before 5:00 p.m., March 30, 1967, whether the buyers will accept the property subject to whatever rights have been created in CHARTER AUTO PARKS or their successors by reason of the lease of January 20, 1966." (C.T. pp. 109-110)

On April 13, 1967, JOHN N. FROLICH replied to said letter and advised QUITTNER that his clients ULLMAN AND SIMON were prepared to close escrow immediately and take title to the property and permit the Trustee to litigate the matter of possession of the Parking Lot in the future. (C.T. pp. 116-117)

On **Friday**, April 28, 1967, JOHN N. FROLICH received one envelope from ARNOLD QUITTNER containing two original letters and copies of other letters notifying ULLMAN AND SIMON that an Order had been signed by the Court which, in effect, cancelled their sale and put the same real property up for further offers on the coming **Monday**, May 1, 1967, at 1:30 p.m. (Exhibits C.T. pp. 118-119-120-121-122 and 123) (C.T. pp. 23 and 24—specifically lines 11 through 19).

Appellants ULLMAN AND SIMON and their attorney JOHN N. FROLICH were present in Court at the hearing on May 1, 1967, at 1:30 p.m., and objected strenuously to the jurisdiction of the Court to proceed with the new sale of the same real property. (R.T. p. 8, line 25 to p. 16, line 10, and re ULLMAN p. 21, line 17 to p. 22, line 5)

It is important to note that the Reorganization Trustee and his attorney ARNOLD QUITTNER, on May 1, 1967, were obviously extremely anxious to make a sale to JOE's AUTO PARKS (a co-partnership), even at the expense of their own

integrity and at a financial loss to the Reorganization Estate, and to pay a Finder's Fee when the Estate had no legal right or obligation to do so. The Referee carefully pointed out that a Finder's Fee was requested by the law firm of SULMEYER & KUPETZ, who then proceeded to waive any right to it. (R.T. p. 3, line 25 to p. 7, line 1)

Further, Exhibit "B" attached to the TRUSTEE'S APPLICATION FOR ORDER MODIFYING ORDER CONFIRMING AND APPROVING SALE OF REAL PROPERTY (929 South Hope Street) filed February 10, 1967, and entered February 14, 1967, and for ORDER PRESCRIBING NOTICE OF HEARING TO CONSIDER FURTHER OFFERS FOR THE SALE OF 929 SOUTH HOPE STREET AND AUTHORIZING CONFIRMATION OF SALE, is the escrow instructions entered into between the Reorganization Trustee (without prior or subsequent Order of the Court) and MORRIS M. GREENSTEIN on April 24, 1967, before the Trustee had applied to the Court for any Order Modifying or Cancelling the Sale with ULLMAN AND SIMON and while the escrow with them was still pending at the Hollywood State Bank–and while he still retained their deposit of $27,500.00 cash. Referring to the matter of a Finder's Fee, the alleged sale to said MORRIS M. GREENSTEIN specifically excluded the liability of the Reorganization Estate in the payment of a Finder's Fee or brokerage fee (C.T. p. 39(f)).

At the time of the alleged sale held in Court, the same MORRIS M. GREENSTEIN bid $308,000.00 for the subject real property (R.T. p. 25, line 22) and the alleged successful bidder, JOE's AUTO PARKS, bid $309,000.00–but subject to a 2 and 1/2 per cent Finder's Fee (C.T. p. 44, line 25 through line 26), which would net the Reorganization Estate

only $301,275.00, $6,725.00 less than the bid of GREENSTEIN would net the Estate! Yet it was approved!

Appellants filed their APPLICATION OF GEORGE ULLMAN AND JOE SIMON FOR AN ORDER TO SHOW CAUSE WHY THE ORDER PRESCRIBING NOTICE OF HEARING TO CONSIDER FURTHER OFFERS FOR THE SALE OF 929 SOUTH HOPE STREET AND AUTHORIZING CONFIRMATION OF SAID SALE SHOULD NOT BE VACATED AND THE PREVIOUS ORDER CONFIRMING AND APPROVING SALE OF REAL PROPERTY (929 SOUTH HOPE STREET) FILED FEBRUARY 10, 1967, AND ENTERED FEBRUARY 14, 1967, SHOULD NOT BE REINSTATED AND THE ESCROW THEREUNDER COMPLETED (C.T. pp. 50 through 78) and an Order to Show Cause in re THE APPLICATION OF GEORGE ULLMAN AND JOE SIMON FOR AN ORDER MODIFYING ORDER OF FEBRUARY 10, 1967, DECLARING THE ALLEGED SALE OF MAY 1, 1967, NULL AND VOID, AND DECLARING THAT THE ORIGINAL SALE TO THE APPLICANTS BE COMPLETED FORTHWITH was issued setting a hearing for May 15, 1967, at 2:00 p.m. (C.T. pp. 81-82).

On May 8, 1967, Honorable Henry C. Westover issued an *ex parte* order which vacated the Order Confirming and Approving Sale of Real Property (929 South Hope Street) to JOE's AUTO PARKS.

This Honorable Court's attention is specifically directed to the appellants' Application for an Order to Show Cause filed May 5, 1967 (C.T. pp. 50 through 78), in which the following verified allegations were made:

> "A. Your Applicants, ULLMAN AND SIMON, were always willing to conclude the sale

as ordered by the ORDER CONFIRMING AND APPROVING SALE OF REAL PROPERTY (929 South Hope Street) FILED FEB. 10, 1967, AND ENTERED FEB. 14, 1967.

"B. Your Applicants were in any event entitled to receive notice of said Application since they already had equitable interest in the subject property under the law of the State of California and were being deprived of property without due process of law.

"C. Your Applicants are interested parties.

"D. There was no restraining order or injunction in effect restraining the foreclosure of the subject property by the Scottish Rite Cathedral Association (the holder of the first trust deed) since 1966.

"E. Prospective purchasers known to the Trustee and his attorney were never notified of the proposed sale to be held on May 1, 1967, in the courtroom of Referee Moriarty.

"F. Trustee never did cancel the sale with Applicants before they applied to the Court on April 25, 1967, for the Ex-Parte Order.

"G. Trustee never attempted to return the deposit of Applicants until after confirmation of sale on May 1, 1967.

"H. Trustee through his attorney defrauded Morris M. Greenstein into purchasing the subject property.

"I. Trustee through his attorney obtained a deed to the subject property by fraud and

misrepresentation. Said deed was obtained from University of America Foundation, the record title holder without any consideration.

"J. Your Applicants have obtained financing for their purchase of the subject property.

"K. Your Applicants have paid out and are obliged to pay out a sum in excess of $6,000.00, all in reliance on their confirmed sale."

The appellants never had the opportunity to present any evidence on said application. On the return date of the Order to Show Cause on May 15, 1967, although the following persons had been subpoenaed and were present in the courtroom and were prepared to testify, the Court indicated it would be a waste of time to hear the matter (R.T. May 15, 1967):

a) Milton Handman (allegations in C.T. p. 57, lines 2-16);
b) Nat Steckler (allegations in C.T. p. 57, lines 18-27);
c) Charles Simmons (allegations in C.T. p. 57, line 29 to p. 60, line 14);
d) Phyllis Jacob (allegations in C.T. p. 58, lines 4-26);
e) Morris M. Greenstein (allegations in C.T. p. 60, line 16 to p. 61, line 31); and
f) Applicants GEORGE ULLMAN and JOE SIMON (allegations in C.T. p. 62, lines 2-22).

The Court denied the application of the appellants and dismissed their Order to Show Cause on May 22, 1967. The appellants filed objections to the Order and moved the Court to rehear the Order, which was denied.

It appears rather odd that on June 5, 1967, JOE's AUTO PARKS filed a NOTICE OF MOTION AND MOTION FOR ORDER CONFIRMING SALE and gave no notice to the

appellants or to the University of America Foundation after they had discovered on May 15, 1967, that both parties alleged interest in the real property. But odder yet are the POINTS AND AUTHORITIES (C.T. pp. 153-157) which, in legal effect, support the position of appellants ULLMAN and SIMON, both then and on this appeal.

Appellants filed their first appeal from the ORDER MODIFYING ORDER OF FEBRUARY 10, 1967, PRESCRIBING NOTICE OF HEARING TO CONSIDER FURTHER OFFERS FOR SALE OF REAL PROPERTY AND DIRECTING SPECIAL MASTER TO HOLD HEARING filed on April 26, 1967 (C.T. pp. 23-25), which purported to terminate the pending sale escrow with ULLMAN and SIMON (C.T. p. 23, lines 23 to 25) without notice (C.T. p. 23, line 20).

The second appeal was filed by appellants from the ORDER DENYING APPLICATION OF GEORGE ULLMAN AND JOE SIMON, filed May 5, 1967, DISMISSING ORDER TO SHOW CAUSE IN RE APPLICATION OF GEORGE ULLMAN AND JOE SIMON issued May 5, 1967, and ENJOINING AND RESTRAINING PARTIES (C.T. pp. 146-149) filed May 22, 1967 (C.T. pp. 180-181).

The third appeal was filed by appellants from the ORDER OF AUGUST 3, 1967, which REINSTATED AND CONFIRMED SALE OF CERTAIN REAL PROPERTY OF MAY 1, 1967, AND VACATING THAT PORTION OF THE ORDER OF THIS COURT OF MAY 22, 1967, to wit, that the TRUSTEE FILE AN APPLICATION WITH THE REORGANIZATION COURT FOR AN ORDER PRESCRIBING NOTICE AND DATE OF HEARING THEREWITH (C.T. pp. 190-194) and (C.T. pp. 195-196).

II

A
CONSTITUTIONAL QUESTIONS INVOLVED

Failure To Give Notice To Appellants Of The Trustee's Application of April 25, 1967, And Order Thereon, Whereby The Sale Of The Property In Question To Appellants Was Vacated, Constitutes A Violation Of Due Process As Provided By The Fifth Amendment To The Constitution Of The United States.

Local Bankruptcy Rule 222 is as follows:

> "The rules of civil procedure for the United States District Courts insofar as they are not inconsistent with the Bankruptcy Act or the General Orders shall apply to and regulate proceedings before the Referees."

11 U.S.C.A. 67 (A-1) relating to the duties of Referees is as follows:

> "Referees shall give notice to creditors and other parties in interest, as provided in this Title . . ."

In the case of *England v. Doyle,* a Ninth Circuit case, 281 Fed.2d 304, the Court, in referring to notice of a hearing, ruled as follows:

> "When the granting of the relief sought by a litigant would operate to terminate, impair or modify a substantial right or claim of another, then due notice of the proceeding must be given the person so affected in order to meet the requirements of due process . . ."

It is clear, therefore, that since your appellants had a substantial right or claim to the real property in question, the failure to give them notice of the application and the opportunity for a hearing thereon before an order was issued constituted a violation of due process as provided for by the Fifth Amendment to the Constitution of the United States.

B
OTHER LEGAL QUESTIONS INVOLVED

1. A Sale By A Bankruptcy Court Is A Judicial Sale.

> "A sale through proceedings in bankruptcy is a judicial sale, subject to the same rules as an auction."
>
> *In re Glas-Shipt Dairy Co.*, 239 Fed. 122, 124 (7 Cir. 1917).
>
> "A sale of assets of a bankrupt's estate, under an order of the Bankruptcy Court directing such sale, is a judicial sale as distinguished from an execution sale. *In re Haywood Wagon Co.* (2 Cir.) 219 Fed. 655, cert. denied 238 U.S. 625, 35 S.Ct. 663, 59 L.Ed. 1495."
>
> *In re Winthrop Mills,* 109 Fed.Supp. 323, 325 (Me. 1952).

2. Public Policy Requires That Judicial Sales Be Final.

An impossible situation would exist if there were no point in time at which all parties could be certain that a sale of assets in bankruptcy was final. A bidder could never be

certain of his rights with respect to property he believed he had purchased at a judicial sale, and therefore no one would bother to bid.

In addition to the above evil, persons who believe themselves to have been purchasers at judicial sales who are required to put up sizable deposits in order to confirm their bid could be seriously damaged. Such is the case in the present situation. In addition to the loss of the use of $27,500.00 (the deposit) for the period from January 19, 1967 to date, petitioners have also been damaged in that they obtained financing commitments at a cost of approximately $10,000.00 to date with respect to the purchase of this property.

For the many above reasons, and for more which can be easily conceived, it is quite obvious that public policy demands that judicial sales, such as the one which is involved in this case, must be final. In addition to the above stated reasons, there are numerous cases which hold that judicial sales must be final.

In the case referred to above, *In re Winthrop Mills, supra,* petitioner contended that the price which had been bid was inadequate and that the sale had not been adequately publicized. He filed a petition in order to overturn the confirmation of the sale to the highest and best bidder. The highest and best bidder had bid approximately 96% of the appraised value of the property. The Court, on review, adopted the opinion of the Referee, upholding the sale. This opinion found that the sale had been well advertised and that the price was adequate. In commenting upon judicial sales, the opinion stated:

> "Judicial sales are an indispensable part of the machinery employed in the administering of

> bankrupt estates. Public policy requires stability in such sales. *In re Burr Mfg. & Surety Co.* (2 Cir.) 217 Fed. 16. To induce bidding at such sales and reliance upon them 'the purpose of the law is that the sale shall be final,' *Rewabic Mining Co. v. Mason,* 145 U.S. 349, 12 S.Ct. 887, 888, 36 L.Ed. 732. Except in extraordinary circumstances the integrity of judicial sales can best be preserved by confirming the highest bids in any case where it appears the auction was fairly conducted, properly attended, and well advertised. There seems to be no cogent reason why these considerations of policy should not govern in the instant case and the petition for confirmation offered by the trustee approved."
>
> (109 Fed.Supp. at 325)

Another case in which similar language appears, although the result differed because of dissimilar facts, is *J. J. Sugarman Co. v. Davis,* 203 Fed 2d 931 (10 Cir. 1953). The following pertinent language appears in that case, starting at page 932:

> "It is well established by an unanimous line of decisions that the integrity of judicial sales must be protected. *It has been said time without number that refusing to confirm a sale to a high bidder merely because an intervening higher bid has been received is the surest way to destroy confidence in judicial sales and defeat the purpose sought to be accomplished thereby,* to realize the greatest amount from such sales to those entitled to receive the proceeds thereof. This principle was announced in the early case of *Jacobson v. Larkey* (3 Cir.) 245 Fed. 538, 541, L.R.A. 1918C, 1176, where the court said, 'The rule

is that mere inadequacy of price is not a sufficient ground for setting aside a judicial sale; but when the inadequacy is so great as in itself to raise a presumption of fraud or to shock the conscience of the Court, it becomes gross inadequacy, and is sufficient ground.' And in *Smith v. Save-Rite Drug Stores* (10 Cir.) 178 F.2d 507, 510, we said that 'A practice of permitting an unsuccessful bidder at a public auction, through sealed bids, after the amount of the highest and best bid at the auction has been disclosed, to submit a second bid when the matter comes on for confirmation of the sale,' would tend to destroy the efficacy of auctions through sealed bids.

"...

"*Where one's bid has been accepted, he has a vested interest which under the decisions may be destroyed only for the most cogent of reasons,* such as fraud, or conduct which in effect amounts to fraud. But as has been said many times, the mere fact that someone comes forward and offers to bid more will not be tolerated because it is an invasion of a right acquired by the successful bidder at a free and open sale and for the further and even more weighty reason that permitting this to be done would undermine confidence in judicial sales and thus defeat the end sought to be obtained, the protection of estates being thus liquidated." (Emphasis added.)

(203 Fed. 2d at 932, 933)

3. **The Federal Courts Are Required To Follow State Decisions On Matters Of General Law.**

It is well established that the Federal Courts are required to follow the statutes or case law of the State, where the cause of action arose with reference to the substantive law to be applied, as long as it does not conflict with the federal law.

Erie Railroad Company v. Harry J. Tompkins, 304 U.S. 64, 82 L.Ed. 1188.

4. **Appellants Were The Equitable Owners Of The Real Property Under California Law.**

In California, the doctrine of equitable conversion is the general law, and under that doctrine, appellants were the equitable owners of the real property in question.

In *Vigli v. Davis,* 79 Cal.App.2d 237, 254, the Court held as follows:

> "Undoubtedly the true rule of equitable estoppel is, as set forth in *Estate of Dwyer,* 159 Cal. 664, as cited by defendants, to the effect that when a binding agreement of sale is entered into by the parties, then equitable conversion has worked; the purchaser becomes the equitable owner of the land and the seller the owner of the purchase price."

In the *Estate of Dwyer,* 159 Cal. 664, on page 675, the Court held:

> "When a contract for sale of real property binding on the parties is executed, an equitable conversion is worked; the purchaser of the land is deemed the equitable owner thereof, and the seller is considered

> the owner of the purchase price. The equitable conversion is thus deemed to exist from the time the valid contract of sale is entered into and may or may not be absolute. Whether it is, or not, will depend upon whether the terms of the contract of sale are subsequently complied with. If there is no default in that respect, but, on the contrary, the purchaser performed all of the conditions precedent which under the contract entitled him to a conveyance on a given date, he will be deemed on that day to be the owner of the land and the sellers to be the owners of purchase money. The fact that the contracting owner of the land refuses to perform his part of the agreement and make the conveyance to which the purchaser is entitled in compliance with the contract, cannot affect the status or right of the parties as to the property. The purchaser having performed or offered to perform his covenant at the date when the contract called for a conveyance to him, equity considers the property as belonging to him as of that date, and the owner as simply holding a legal title in trust for him. . . ."

It is clear, therefore, that your appellants had a substantial right and claim to the property in question and that the action of the Trustee in vacating the Order of Sale of February 10, 1967, to your appellants, terminated, impaired, and modified said right. The law of California is clear insofar as the interest of your appellants in the real property is concerned, and it is clear that a mere contract right, even in the absence of the doctrine of equitable conversion, should be afforded the same protection of due process , as the case herein where, in

fact, the doctrine of equitable conversion conveyed title to the real property to your appellants. Keeping in mind the landmark decision of *Erie v. Tompkins, supra,* this Honorable Court is required to follow the general laws of the State of California which provide for the doctrine of equitable conversion. In legal effect, by said doctrine, the equitable title was conveyed to appellants from the date the contract was entered into and confirmed by a court of competent jurisdiction.

5 The Order Of The United States District Court (of February 10, 1967) Confirming Sale Of The Real Property To ULLMAN And SIMON Was Final When The Court Attempted To Set It Aside, And The Order Of The Court Purportedly Setting It Aside Was In Excess Of Its Jurisdiction.

On the 10th day of February, 1967, an order confirming sale of the subject property was filed, and on the 14th day of February, 1967, it was entered. The United States District Court confirmed the sale of the real property in question, by its Order of that date, to ULLMAN and SIMON. No motion for rehearing nor appeal from that order has ever been taken.

> "A person aggrieved by an order of a referee may, within ten days after the entry thereof, or within such extended time as the Court may for cause so allow, file with the referee a petition of review. . . ."
>
> 11 U.S.C.A. Section 67.
>
> "Appeals under this Title to the United States courts of appeals shall be taken within thirty days

> after written notice to the aggrieved party of the entry of the judgment, order or decree. . . . "
>
> 11 U.S.C.A. Section 48-A.

Where the time for appealing from an order of the bankruptcy court has expired, the order becomes a final order and is no longer the subject of review. See

Jelks v. Aetna Life Insurance Co.,
134 Fed.2d 870.

Failure to prosecute an appeal in thirty days is fatal to the appeal. See

Clements v. Conyers, 31 Fed.2d 563.

It is clear, therefore, that the order confirming sale of the real property in question to the appellants is a final order, no appeal having been taken within the statutory period. That being the case, said order could not be disturbed as a matter of law, either on April 26, 1967, or at this time, with or without prior notice to appellants.

6. The Trustee In Bankruptcy Had Waived Any Possible Right To Cancel The Escrow With ULLMAN And SIMON And Was Estopped From Taking Any Affirmative Action To Cancel Either The Sale To Appellants Or Said Escrow.

> "A waiver is the intentional relinquishment of a known right with knowledge of the facts. It is a voluntary act and implies an abandonment of a right which can be enforced or a privilege which can be exercised."
>
> *Strauss v. Owens,* 148 Cal.App.2d 570, 574.

On March 23, 1967, the attorney for the Trustee wrote a

letter to JOHN N. FROLICH setting forth a deadline of March 30, 1967, in which appellants herein could accept the property in question with the existing encumbrances. On April 13, 1967, JOHN N. FROLICH wrote the attorney for the Trustee agreeing to take the property under the existing contingencies and to close the escrow immediately.

If the Trustee had any rights whatsoever to cancel the sale to your appellants on March 30, 1967, then those rights were waived by his inactivity to the 13th day of April, 1967. In fact, he did not take any action until the 25th day of April, 1967, when he entered into a contract for the sale of the property in question with MORRIS M. GREENSTEIN without any authority from the Court.

> "Waiver may be shown by conduct, and it may be the result of an act which, according to its natural import, is so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that such right has been relinquished."
>
> *Howard J. White, Inc. v. Varian Associates,* 178 Cal.App.2d 348, 355.

The conduct of the attorney for the Trustee clearly precludes his asserting any reason whatsoever for not conveying title as it stood at that time, to your appellants herein.

> "One who agrees to waive or forego a right is precluded from afterwards asserting the right waived." See
>
> *Faye v. Feldman,* 128 Cal.App.2d 319, 328.

In *People v. Ventura Refining Co.,* 204 Cal. 286, 295, the Court held as follows:

> "Anyone may waive the advantage of a law intended

> solely for his benefit. It has been held many times in this state and the rule is universal that a party may waive the benefits specially conferred upon him by statute and constitution. When this waiver is made, estoppel to rely on the exemption will arise in any case where it is inequitable or unjust to permit it."

In the present case, the Trustee requested that appellants, by a given date, accept or reject a proposal for changed terms for the purchase of the real property in question. Although the appellants did not respond by the date in question, the Trustee took no action whatsoever. On April 13, 1967, the Trustee was notified that appellants would accept the property with the title as it then stood. Thirteen days thereafter, without any notice whatsoever, the attorney for the Trustee presented an *ex parte* application to the Court for an order which had the effect of terminating the sale to appellants and allowing bidding to be commenced again. Appellants had equitable title to the property under California law, *supra*. Assuming without admitting that the Trustee may have had the right to terminate the escrow, it was waived by his inactivity and his failure to take any steps whatsoever. The Trustee was therefore estopped to assert any action whatsoever, especially after the letter of JOHN N. FROLICH, as aforementioned, dated April 13, 1967.

7. Damages Do Not Constitute An Adequate Remedy At Law For The Breach Of Contract To Convey Real Property.

While the contract of sale and the escrow instructions between the Trustee and appellants for the purchase and sale

of the real property contained a no-damage provision, this was for the protection of the Estate in the event of impossibility of performance on the part of the Trustee and not for a deliberate, wilful breach of the contract.

Under the doctrine of *Erie v. Tompkins, supra,* this Honorable Court is required to follow the general laws of the State of California where they do not conflict with Federal authority.

> "It is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation."
>
> California Code of Civil Procedure,
>
> Sec. 33e 87.
>
> "Ordinarily, if the remedy at law is not adequate, specific performance of any obligation may be compelled if the circumstances are such to authorize relief of that nature and if personal services are not involved. A contract for the sale of real property is perhaps the most common situation where specific performance is granted if the contract fulfills requirements . . . It is presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation. Even a stipulation of the amount of damages in a particular case will not prevent specific performance. Such a stipulation merely gives a party a right to be satisfied with damages, but, waiving them, he may resort to equity for specific performance. Specific performance of land contract may be enforced by either the purchaser or the vendor." See:

45 Cal. Jur. 2d page 321, Section 45,
and authorities cited therein.

8. **The Contract For The Purchase Of Real Property Between Appellants And The Trustee Was Never Cancelled, Terminated, Or Rescinded When The Court Arbitrarily Cancelled It, Ex Parte And Without Notice, On April 26, 1967.**

The Escrow Instructions, page 2, Item No. 3, the last sentence thereof, recite the following:

> "Seller shall have the right to abandon this escrow if he determines that he cannot deliver possession of the parking lot within a reasonable period of time to buyer."

On March 23, 1967, the attorney for the Trustee wrote to JOHN N. FROLICH. Said letter seems to form the basis for the action of the Trustee in seeking his *ex parte* order on April 25, 1967. Careful scrutiny of the letter dated March 23, 1967 will show that the attorney for the Trustee did not, at that time, seek to cancel the contract. Said letter recites:

> "That it appears unlikely the possession of the parking lot can be delivered within a reasonable period of time . . ."

The letter then goes on to inquire as to whether or not the purchasers would accept the property subject to whatever rights have been created in the third party. Certainly the letter as heretofore described does not cancel in any way the contract of sale between ULLMAN and SIMON and the Trustee.

In the case of *Busch v. Globe Industries* (1962) 200

Cal.App.2d 315, 320, the Court held as follows:

> "A contract remains in force until it has been terminated either according to its terms or through the acts of the parties evidencing an abandonment [citations omitted]. Abandonment of a contract is a matter of intent and is to be ascertained from the facts and circumstances surrounding the transactions out of which the abandonment was claimed to have resulted. It may be implied from the acts of the party [citations omitted]."

In *Kane v. Sklar* (1954) 122 Cal.App.2d 480, 482, the Court held as follows:

> "The question whether there was an intent to abandon a contract is one of fact to be ascertained from all the facts and circumstances surrounding the transaction [citations omitted]."

On April 13, 1967, JOHN N. FROLICH wrote ARNOLD QUITTNER, attorney for the Trustee. Clearly the seller of the real property in question never intended to terminate the contract as of the date of MR. FROLICH's letter, in that he had not tendered return of the monies deposited with the Trustee and into escrow. Furthermore, the conduct of the parties clearly illustrated that the contract was still in force.

When a valid consideration exists for the contract in question–and the law presumes that the consideration was real and adquate, the seller is not allowed to capriciously terminate the contract. There would have to be cause for the termination. The purchasers of the real property, therefore, would be entitled to a hearing to determine whether or not the seller was attempting to terminate the contract without any

cause whatsoever, especially in view of the fact that the contract had not been terminated prior to the letter of April 13, 1967.

9. Once A Sale Has Been Confirmed By The Court Nothing Is Sufficient To Avoid It Which Would Not Set Aside A Sale Of Like Character Between Private Parties.

In the case of *In re Marathon Foundry & Machine Co.*, 239 Fed.2d 122, the Court stated, at page 126:

> "The *Burr* case, however, is of no benefit to petitioner. There, the District Court confirmed a judicial sale, set it aside and ordered the property resold to a substantially higher bidder. The Court of Appeals reversed, holding that it was error to set aside the order of confirmation. The court stated, at page 21: 'Before confirmation, if the inadequacy of the price be great, slight circumstances of unfairness on the part of the party benefited will be sufficient to prevent confirmation, and will justify the opening of the sale for further bids. * * * But the case is different after the sale has been confirmed, and the court below seems to have lost sight of this distinction. After a sale has been confirmed, the court and the successful bidder are regarded as occupying the relation of vendor and purchaser in an executed sale, and nothing is sufficient to avoid it which would not set aside a sale of like character between private parties."

And at page 127:

> "The master, and apparently the District Court, in addition to our previous opinion 228 F.2d 594, relied upon *J. J. Sugarman Co. v. Davis.*, 10 Cir., 203 F.2d 931, and *In re Stanley Engineering Corp.*, 3 Cir., 164 F.2d 316. The *Sugarman* case, as here, involved a proceeding for reorganization under Chapter X. A sale to the highest bidder was approved both by the District Court and on review. In so doing the Court of Appeals made the following pertinent observation, 203 F.2d at page 933: 'Where one's bid has been accepted, he has a vested interest which under the decisions may be destroyed only for the most cogent of reasons, such as fraud, or conduct which in effect amounts to fraud. But as has been said many times, the mere fact that someone comes forward and offers to bid more will not be tolerated because it is an invasion of a right acquired by the successful bidder at a free and open sale and for the further and even more weighty reason that permitting this to be done would undermine confidence in judicial sales and thus defeat the end sought to be obtained, the protection of estates being thus liquidated.' "

And further the Court stated:

> "It appears to be conceded on all sides that adequacy of price must be determined as of the time of sale. It has been so held. *Morrison v. Burnette,* 8 Cir., 154 F. 617, 625. See also our previous opinion in this matter, 228 F.2d at page 598."

III

SUMMATION

In view of the fact that your appellants were entitled to notice and a hearing prior to the issuance of the Order of April 26, 1967, as a matter of due process under the Fifth Amendment to the Constitution of the United States, it follows that any action taken pursuant to said Order is void and in excess of the Court's jurisdiction. Certainly the sale of May 1, 1967, is nothing more than an extension of the Order of April 26, 1967, and, but for said Order, would not have taken place.

It must also be pointed out that the alleged sale took place prior to May 26, the time that the Order of April 26, 1967, would be final. As previously noted, your appellants, as real parties in interest, had a right to appeal from said Order, and they did.

The sale of May 1, 1967, was invalid under California law by virtue of the doctrine of equitable estoppel, *supra,* wherein your appellants are the equitable owners of the property in question.

It follows, therefore, that the Order of April 26, 1967, being invalid,and the sale of May 1, 1967, being invalid, the original Order of Sale to your appellants has never been cancelled. Your appellants are ready, willing and able to perform any necessary acts required of them to gain legal title to the property.

The time has passed whereby objections may be asserted against the Order of Sale confirmed to appellants on February 10, 1967. As to them, the sale is final and they wish to

consummate it. The Trustee had clearly waived any rights he may have had, if in fact he had any rights at all, and is estopped to countermand the sale to your appellants at this time, especially in view of the detriment suffered by your appellants, as set forth herein.

Finally, as a matter of simple logic, the estate had nothing to sell on May 1, 1967, the real property in question belonging to your appellants. If the Supreme Court of the United States is correct in its definition of due process, then the concept of basic fairness and an orderly society demands that this Honorable Court compel the Court, the Trustee of the Estate, and the Trustee's attorney, to finalize the sale to your appellants.

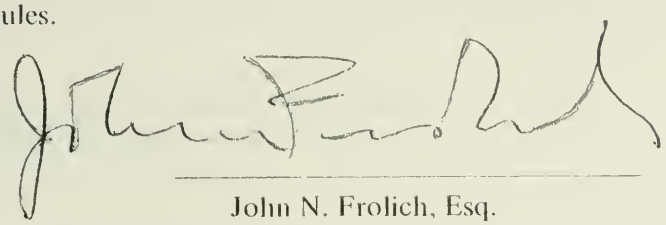
Respectfully submitted,

JOHN N. FROLICH

Attorney for Appellants
George Ullman and Joe Simon

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United State Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



John N. Frolich, Esq.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on February 15 1968, I served the within APPELLANTS' OPENING BRIEF (22153, 22153-A) on the following named parties by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said parties at the addresses as follows:

Gendel, Raskoff, Shapiro & Quittner
6380 Wilshire Boulevard
Los Angeles, California

Goldman & Goldman
408 South Spring Street
Los Angeles, California 90013

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 15 1968, at Los Angeles, California.

D A Standefer

Subscribed and sworn to before me
this day of February, 1968.

_____
Notary Public in and for the
State of California.

DEAN-STANDEFER COMPANY, 215 W. 5th, L.A. 90013

ADDENDUM TO APPELLANTS' OPENING BRIEF

In re: Ullman & Simon vs. Grainger, et al.
No. 22153 – 22153–A
United States Court of Appeals For the Ninth Circuit

It is respectfully requested that this document be attached to and made a part of the Appellants' Opening Brief filed and served in the above matter.

Service hereof conforms with that specified in the Proof of Service annexed to Appellants' Opening Brief.

TOPICAL INDEX HEREOF:

TABLE OF AUTHORITIES CITED

Cases

TABLE OF AUTHORITIES CITED

Cases (cont'd)

Statute

NO. 22153
22153–A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE ULLMAN & JOE SIMON,
INTERESTED PARTIES,

Appellants,

vs.

KYLE Z. GRAINGER, JR., et al.,

Appellees.

Appeal from the United States District Court for
the Central District of California

ADDENDUM TO APPELLANTS' OPENING BRIEF

II

B

OTHER LEGAL QUESTIONS INVOLVED

10. The Three Orders Appealed From Are Void For Failure To Comply With Section 206 and Section 208 Chapter X Of The Bankruptcy Act.

Section 206 of Chapter X of the Bankruptcy Act reads as follows:

> "The Debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter. . . ."

In decisions applying Section 206 of the Bankruptcy Act, the courts have held that The Debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the absolute right to be heard on all matters arising in a proceeding under this chapter. Creditors, stockholders and indenture trustees are fully vested with the right to be heard on all matters, with the right to appeal, and with the right to receive notice.

In re The Philadelphia and Reading Coal and Iron Co. (DC Pa. 1939) CCH Dec. Chptr. 51,743.

In re Flour Mills of America, Inc. (DC Mo. 1939) 27 F.Supp. 559, 41 Am. B.R. (N.S.) 59, CCH Dec. Chptr. 51,816.

In re 8309 Talbot Place Corp. (DC NY 1939) 27 F.Supp. 40, 40 Am. B.R. (N.S. 257).

A district court properly denied the motion of a committee of common stockholders to intervene in a reorganization proceeding under Chapter X, but properly designated the committee as a party to receive notice of all matters arising in the proceeding and gave them the right to participate therein as provided by statute.

Dana v. Securities and Exchange Commission, (CCA-2) 125 F.2d 542, 47 Am. B.R. (N.S.) 739, CCH Dec. Chapter 53,598.

An order of a bankruptcy court appointing successor trustees to a common law trust, involved in involuntary bankruptcy proceedings, to fill positions vacated by death and resignation, was reversed on appeal for failure to give notice to beneficiaries of the trust and accord to them the right to be heard.

In re National Realty Trust, Sullivan v. Mosser (CCA-7 1948) 167 F.2d 440, CCH Dec. Chapter 56,050.

It is an idle formality to require a creditor who failed to appear on the first hearing of creditors, but who must be given notice of the second hearing, to wait until the plan of reorganization comes up for confirmation in order to raise any objections which are apparent on the face of the plan; all creditors have an absolute right to be heard on all matters and it is desirable that they should be heard as soon as convenient.

Dudley v. Mealey (CCA-2 1945) 147 F.2d 268, CCH Dec. Chaptr. 55,096, cert. den. (1945) 325 U.S. 873, 65 S.Ct. 1415.

Section 208 of Chapter X of the Bankruptcy Act reads as follows:

> "The Securities and Exchange Commission shall, if requested by the judge, and may, upon its own motion if approved by the judge, file notice of its appearance in a proceeding under this chapter. *Upon the filing of such a notice, the Commission shall be deemed to be a party in interest, with the right to be heard on all matters arising in such proceedings,* and shall be deemed to have intervened in respect of all matters in such proceeding with the same force and effect as if a petition for that purpose had been allowed by the judge; but the

> Commission may not appeal or file any petition for appeal in any such proceeding." (Emphasis added.)

Section 265a of Chapter X of the Bankruptcy Act reads as follows:

> "In addition to the notices elsewhere expressly provided, the Securities and Exchange Commission shall be given notice of all other steps taken in connection with a proceeding under this chapter. Any notice which this chapter requires to be given to the Securities and Exchange Commission shall be deemed to have been sufficiently given if it is given by registered first-class mail, postage prepaid, addressed to the Securities and Exchange Commission at Washington, District of Columbia, or at such other place as the Securities and Exchange Commission shall designate by written notice filed in the proceeding and served upon the parties thereto. . . . "

(A) As to the (FIRST) APPEAL FROM THE ORDER filed April 26, 1967. *This Order states "no notice being required . . . "* (C.T. p. 23, line 20)

(B) As to the (SECOND) APPEAL FROM THE ORDER filed May 22, 1967, *there is no recital of notice to creditors or the Securities and Exchange Commission of the hearing of May 15, 1967, which is the basis of the Order.* (C.T. pp. 146 through 149)

(C) As to the (THIRD) APPEAL FILED FROM THE ORDER filed August 3, 1967, *no notice of the hearing to creditors or the Securities and Exchange Commission was given of the hearing on June 26, 1967, which is the basis of the Order.* (C.T. p. 190, line 19 to p. 191, line 13)

It should be noted that, in any event, if the First Order

(April 26, 1967) was a valid one, then ULLMAN and SIMON were creditors of the estate in the amount of $27,500.00—the amount of their cash deposit, which the Trustee retained and was holding when said Order was signed by the Court— and they were entitled to notice.

The Securities and Exchange Commission was requested to and did file a Notice of Appearance in the instant proceeding and never received notice of any of the three Orders set forth above, before they were signed by the Court.

Respectfully submitted,

JOHN N. FROLICH, ESQ.

Attorney for Appellants

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

JOHN N. FROLICH, being first duly sworn deposes and says:

That he is the attorney-of-record for the Appellants' ULLMAN AND SIMON in this appeal.

That when he gave the rought draft of the Appellants' Opening Brief to the printer Dean Standefer Company, he inadvertantly omitted several pages.

Your Affiant did not notice the ommission until Monday, February 26, 1968, when he received a copy of the Appellants' Opening Brief from the printer.

Your Affiant respectfully requests that the attached pages be considered as part of the Appellants' Opening Brief.

I declare under penalty of perjury that the for going is true and correct.

Executed on February 26, 1968.

JOHN N. FROLICH

SWORN TO BEFORE ME
THIS 26th DAY OF FEBRUARY,
1968.

NOTARY PUBLIC

My Commission Expires

My Commission Expires September 3, 1970